No. 13690

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, A CO-PARTNERSHIP D/B/A NEMEC COMBUSTION ENGINEERS, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for the enforcement of its order issued against respondents on September 11, 1952, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 151, *et seq.*).[1] The Board's Decision and Order (R. 37-41) [2] are reported in 100 NLRB No. 162.

[1] The pertinent provisions of the Act are set forth in the Appendix *infra*, pp. 30-33.

[2] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred at respondent's plant at Whittier, County of Los Angeles, California, within this judicial circuit.[3]

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

The charging party in this case, International Union, United Automobile Workers, A.F.L. (hereinafter called the Union) attempted to organize respondent's employees in the last two or three months of 1950. On December 28 of that year, Employee Thomas Frederick, the Union's chief promoter in the plant, was discharged and the employment of a welder named Clarence Leeper was also terminated that same day. In agreement with the Trial Examiner, the Board found that respondent violated Section 8(a)(1) and (3) of the Act by discharging Frederick because of his activity on behalf of the Union and discharging Leeper because he led a group of employees in concerted activity protected by Section 7 of the Act. The subsidiary facts on which these findings are based are summarized below.

A. The discharge of Employee Frederick for engaging in Union activities

1. *Frederick's employment record*

Thomas Frederick worked steadily for respondent, except for two short economic layoffs, from 1946 until he was discharged on December 28, 1950 (R. 15; 87-89). When first hired, Frederick had just come out of the

[3] Respondent partnership operates a job machine shop, employing about 125 workers (R. 23; 160). It manufactures combustion equipment, and admits that it is engaged in commerce under the Act (R. 13; 5, 7-8, 43).

Navy, where he had received some training in machine work (R. 192). Respondent took over his training, and for about a year he was assigned to machining axles (R. 16; 170, 192). His performance was considered "fairly satisfactory" (R. 193, 170), and Ed Gilly, the shop foreman, told Fred Nemec, one of the partners in the firm, that he was "a good man on axles" (R. 157). In 1950, Frederick arranged with respondent to work part-time only, averaging 30 hours a week, in order to attend school under the G. I. Bill (R. 15; 88-89, 100-101, 171). During this period, Frederick's work consisted chiefly of machining carbon inserts (R. 16; 170-171). This was an unpleasant, dirty task and Frederick protested being assigned to it so steadily (R. 16, 21; 94-95, 109, 182, 194-195). He had a special aptitude for making the carbon bores, however (R. 195), and was not relieved of the assignment until early December 1950. At that time Frederick was put on set-up and machine repairing, which was work he had done intermittently in the past; and a full-time employee was assigned to producing carbon bores, for which respondent's production requirements had then increased (R. 95, 97, 109, 172, 180-181, 206).

2. *Frederick is discharged immediately after soliciting for the Union*

In October 1950, Frederick became interested in the Union, which was then embarking on a campaign to organize the plant. He served as the Union's one-man organizing committee (R. 13-14; 51-53, 89-91, 97-98). On December 27 and 28 he brought 100 Union designation cards into the plant and, with the aid of one or two other employees, distributed them to his fellow workers

to be signed (R. 16; 55-56, 90, 102-103, 104). Cards signed by 55 employees, approximately half of respondent's work force, were returned to Frederick on the 28th (*ibid.*). He attempted to avoid observation while engaged in this solicitation campaign, but Foreman Gilly saw him handing out a card (R. 16, 21; 90-91, 104-105, 179). Realizing that Gilly had observed him, Frederick facetiously suggested to the foreman that he ought to sign a union card himself (R. 16; 90-91, 104-105, 120).

Shortly afterward Gilly brought Frederick his paycheck and discharged him, stating that Fred Nemec, one of the partners in the firm, had complained of his failure to keep his machines clean (R. 16, 17; 92, 106-107). Frederick said "You know that isn't right, Ed," and suggested that the discharge was due to his Union activity, to which Gilly replied, "All I know is what the old man told me" (R. 16; 93, 107, 178).[4]

On the following day, the Union filed a petition with the Board, seeking an election and certification as bargaining agent of respondent's employees (R. 49).[5] In discussions with the men during this period, respondent Martin explained that the Company could not afford to meet the Union's anticipated demands for higher wages (R. 23; 81-82, 85), and Nemec told one employee that he did not "see where the unions were going to do anybody any good in our shop" (R. 23; 168). For leading a group of welders in an attempt to obtain an increase

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[4] Prompted by respondent's counsel, Gilly testified at one point that in this interview he also referred to the sledgehammer and toolholder incidents, discussed below. The Trial Examiner did not credit this testimony, which was in conflict with Frederick's version of the conversation (R. 16, 22).

[5] A consent election was held on January 23, 1951. The Union lost the election but filed objections. The representation case was thereafter suspended without final ruling by the Regional Director, pending the outcome of this unfair labor practice case (R. 49-50).

in pay, respondent also discharged employe Clarence Leeper on December 28, as discussed below (pp. 8-12, 17-21).

3. *Respondent's subsequent explanation of Frederick's discharge*

In the proceedings before the Board, respondent contended that Frederick was discharged for careless workmanship, refusal to perform tasks assigned to him, and failure to obey instructions (R. 9). Respondent relied chiefly on Foreman Gilly's testimony to support these contentions for it was Gilly who was primarily responsible for the discharge. On December 28, the foreman recommended this action to Elwood Martin, one of the partners in the firm, and received permission to do as he saw fit (R. 17; 177, 196, 200-201). Contrary to what Gilly told Frederick in the discharge interview, Partner Fred Nemec, the "old man" (p. 4, *supra*) was not consulted (R. 20; 159).

In line with what Gilly told Frederick at the time of the discharge, the foreman and both partners, Martin and Nemec, testified that Frederick had failed, in the face of specific admonitions, to observe a plant rule requiring all employees to keep their machines clean (R. 157, 172, 173, 193). However, respondent's officials did not deny that this was a chronic fault of many of the employees (R. 108, 150, 173); and they admitted that Frederick had not been reprimanded for leaving a machine dirty since 1948 (R. 21; 182-183, 165-166). According to Gilly, the principal cause of the discharge was a series of incidents which took place in December 1950. As to these incidents he testified as follows:

(1) Early in December, the foreman said, Frederick threatened to quit unless he was taken off the carbon-

boring work, which he disliked.[6] Thereupon, as Partner Martin also testified, Gilly complained to Martin, stating that Frederick seemed to have lost interest in his job, and ought to be discharged or allowed to quit because he was not qualified for any other work but carbon machining. (R. 18; 172, 173-174, 184, 194, 199.) Martin, however, declared that it would be bad policy to discharge an employee just before Christmas, instructed the foreman to find something for Frederick to do, and said to "keep him on until after the first of the year [to] * * * see how things would work out" (R. 16; 172, 184, 199).

(2) After Frederick was assigned to set-up and machine repair work, according to Gilly, he disobeyed instructions while working with another employee on the assembly of a Potter & Johnston machine. The foreman allegedly observed the two employees using a sledge hammer to force a drum into place, told them not to use the hammer, and then, when he caught them using it again a few minutes later, admonished them to "at least use a block of wood [to take the force of the blows] if they wanted to hammer on it" (R. 174-175). Gilly claimed that this incident occurred on December 27, and stated that he reported it to Partner Martin on the 28th when he sought permission to discharge Frederick; but Martin's testimony showed that it was actually a week before, about December 20 or 21, that Gilly told him about Frederick using a sledge hammer (R. 17; 174, 184, 199-200, 208).[7]

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[6] Frederick admitted that he grumbled about this assignment, but denied that he refused to perform the work, or threatened to quit (R. 108-109).

[7] Frederick recalled working on a Potter & Johnson machine at that time, but did not remember using a sledge hammer (R. 98, 112).

(3) Finally, Gilly testified, Frederick disregarded his instructions as to the method of performing a machine set-up task to which he was assigned on December 28; a toolholder on the machine broke as the result of the employee's carelessness; and this was the episode which immediately precipitated the discharge (R. 17; 176-177). Frederick, who denied that he had ever refused to follow instructions in his work (R. 99), admitted that the toolholder had broken when he was working on this machine, but pointed out that it was a very old machine which had been broken before in the same spot (R. 109-110). Gilly, although insisting that Frederick was at fault, admitted these mitigating circumstances (R. 187, 189).

Gilly conceded in his testimony that Frederick may have spoken to him about signing a Union card on December 28 (R. 21; 179, cf. p. 4, *supra*), but nevertheless denied, as did Nemec and Martin, that he was aware of Frederick's connection with the Union until after the discharge (R. 158-159, 178, 201). The Trial Examiner specifically discredited this testimony, stating, among other things, that Gilly did not impress him as a reliable witness, and that Frederick's activity in circulating Union cards was too extensive to have escaped observation in this small plant (R. 20, 23).

4. *The Board's Conclusions as to Frederick's discharge*

Upon consideration of all the foregoing evidence, the Board found that respondent discharged Frederick because of his organizational activity on behalf of the Union, thereby violating Section 8 (a) (3) and (1) of the Act. In full agreement with the Trial Examiner, the Board found that the single cause—failure to clean

machines—stated to Frederick at the time of the discharge was an "ancient complaint," resurrected as a mere pretext to justify the summary dismissal (R. 22). And, for the reasons analyzed in the Argument, *infra* (pp. 14-16), the Board rejected respondent's other explanations of the discharge, based on Frederick's alleged offenses during the last month of his employment, which were advanced for the first time in answer to the complaint in this case.

B. The discharge of Employee Leeper for engaging in concerted activities

1. *Leeper speaks for his fellow employees in the welding shop, demanding correction of certain grievances*

Clarence Leeper, a welder of 22 years' experience, worked for respondent from October until December 28, 1950, when he was discharged. He died 6 months later, before the date of the Board hearing in this case (R. 12, 20; 124).

On December 27, 1950, Leeper was working on the night shift, which began at 5 p.m. and ended at about 5 a.m. (R. 64). That night, 15 employees, all the men working in the shop on that shift, gathered in one of the welding booths (R. 57-58). They brought in Night Superintendent Milliron and spoke to him about securing a night bonus and a paid lunch period (R. 14; 58). At their request, Milliron fetched Copartner Nemec. He told Nemec that "there was a work stoppage in the welding shop and Mr. Leeper had all the welders in an uproar" (R. 14; 152). When Nemec arrived on the scene, Leeper, speaking on behalf of his fellow employees (R. 60, 69, 148), told him that the men wanted a

night shift bonus and pay for their lunch period, and had been unable to get any satisfaction from Foreman Gilly and Copartner Martin, to whom they had previously spoken (R. 14; 70). Leeper said: "We want a showdown on this lunch hour pay . . . If we don't get it, we are going to walk out" (R. 14; 153). One of the other welders dissociated himself from this suggestion (*ibid*). Nemec, claiming not to be well acquainted with the problem, replied that he could not overrule the decisions of Gilly and Martin, but would check into the situation to see whether any commitments had been made (R. 60, 70, 145, 153). Leeper then stated that if the employees' demands were not granted, he was "quitting" (R. 14; 60, 70, 153). Thereupon another employee intervened, saying "I hope you don't mind if we don't strike along with you"[8] (R. 153). A third employee, however, announced that "[s]o far as I am concerned, you can give me mine now" (R. 14; 60-61, 152), whereupon Nemec told him "Well just go on to the office. We don't want any hotheaded characters around here" (R. 60-61). The conversation concluded with Leeper giving Nemec 24 hours in which to reach a decision (R. 14-15; 154).

After Nemec left the department, Leeper said to Welder Grimm: "When we check in . . . [W]e will come in at 4:30 and get our hoods and march out in front of the machine shop so they can see us" (R. 146).

The meeting over, Leeper went back to work and continued at his job for the remainder of the shift (R. 15; 146-147, 61). When he left the plant, he did not, as was the customary procedure for employees leaving

[8] This phrase was incorrectly quoted in the Intermediate Report as "string along" (R. 14).

permanently, take his tools home with him (R. 20; 66, 126-127).

2. *Respondent's refusal to let Leeper come to work after the welding-shop incident*

On the afternoon following the incident in the welding shop, December 28, Leeper left home at the usual time before 4 p.m., taking his lunch along (R. 15; 126).

Around 4 o'clock that afternoon, when Leeper had already left for the plant, Nemec came to his house (R. 15; 125-126, 155), and inquired whether he was at home. Mrs. Leeper, who had never seen Nemec before (R. 137), replied, "No, he has gone to work" (R. 125). Nemec said he wanted to see Leeper and handed her Leeper's paycheck to date (R. 126). He told Mrs. Leeper that her husband had quit, at which she expressed surprise. She wanted to know what was the matter, and Nemec said "Well, he has given us an ultimatum of several things he wants and we can't meet his demands. Therefore we are letting him quit" (R. 155-156). He also stated that Leeper was one of the best welders the firm had ever had, that he had intended to make him a foreman (R. 126), and "hated to see him go" (R. 155). But, he maintained, Leeper had gotten the welding shop in an uproar and "we couldn't be pushed around like that . . . Due to the trouble he had stirred up in the welding shop, we couldn't put him back" (R. 155, 163-164). Nemec then left, taking back Leeper's paycheck (R. 126, 130-131).

In the meantime, Leeper had returned to the plant, but apparently was not allowed to work that day (R. 15; 61). He did not see Nemec on the 28th (R. 156). In the next few days, he made several more attempts to get

back on the job. He telephoned the plant to find out why he was not permitted to work (R. 15; 128-129), and he also had an interview with Nemec, offering to waive his demand for retroactive pay (R. 15; 127-128, 162-163). Nemec refused, however, to take him back because "things had gone as far as they had. There was so much trouble stirred up it just wouldn't be right" (R. 163). On this occasion Nemec acceded to Leeper's request for 4 hours call-in pay for December 28, the day following the meeting in the welding shop (R. 20; 132-133, 159-160).

The shift bonus and paid lunch period, for which Leeper had fought, were subsequently granted to the employees (R. 61-62).

3. *The Board's conclusions as to Leeper*

Rejecting respondent's claim that Leeper had voluntarily terminated his employment by quitting, the Board found that respondent discharged the employee because of the leading part he played in the welding shop incident, and that, since this incident constituted concerted activity protected by Section 7 of the Act, the discharge was an unfair labor practice forbidden by Section 8 (a) (1) of the Act (R. 18-20).

Following its reasoning in an earlier case,[9] the Board also held that respondent's treatment of Leeper discouraged membership in labor organizations and accordingly violated Section 8(a)(3) of the Act as well as Section 8(a)(1), (*ibid*) because: (1) the group of employees who joined with Leeper in seeking improvement in their wages and working conditions constituted a labor organization under Section 2(5) of the Act;

[9] *Smith Victory Corporation*, 90 NLRB 2089, 2101, 2104, affirmed 190 F. 2d 56 (C.A. 2).

and (2) to discourage employees from resorting to "concerted" activity for the purpose of "mutual" aid (Section 7) normally tends to discourage them from joining and supporting labor organizations, the customary instrument of such movements.

SUMMARY OF ARGUMENT

1. The Board properly determined that Frederick and Leeper were victims of unlawful discrimination:—

a. Substantial evidence supports the Board's finding that Frederick's activity in behalf of the Union was the motivating cause of his discharge. Accordingly, the discharge constituted a violation of Section 8 (a) (3) and (1) of the Act.

b. The undisputed facts show that respondent denied employment to Leeper because he acted as leader and spokesman of the group of employees who stopped work in the welding shop for the purpose of presenting a concerted demand for higher pay. Since this was concerted activity "for the purpose of * * * mutual aid" protected by Section 7 of the Act, respondent's discriminatory reprisal against Leeper plainly violates Section 8 (a) (1) of the Act, if not Section 8 (a) (3) as well. On the record, the Board was fully warranted in rejecting respondent's contention that Leeper resigned his job voluntarily. Moreover, even if it can be said that Leeper "quit," respondent undeniably anticipated his immediate application for reemployment and refused to take him back because of his leadership in the protected activity of the welding-shop employees. Either way, the decisive act in terminating Leeper's employment was respondent's and it was an unfair labor practice.

2. There is no merit in respondent's contention that the complaint herein was barred by the 6-months limitation contained in Section 10 (b) of the Act. The charge was timely filed, and it refers with adequate particularity to the discriminatory discharges of Frederick and Leeper, the only unfair labor practices alleged in the complaint which were found to have been committed in this case.

ARGUMENT

I. The Board Properly Determined That Respondent Discriminated Against Employees Frederick and Leeper, in Violation of Section 8 (a) (1) and (3) of the Act

A. *Substantial evidence supports the Board's finding that Frederick was discharged because of his activity in behalf of the Union*

As we have seen (pp. 2-5, *supra*) Thomas Frederick, who had worked for respondent for 6 years, was summarily discharged on December 28, 1950, immediately after Foreman Gilly saw him passing out union cards in the plant. That day and the day before, Frederick had been responsible for distributing 100 of these cards among respondent's 125 employees; and the Board was clearly entitled to infer, as it did, that his leading role in the Union's organizing campaign had by this time come to the notice of respondent's officials (pp. 3-4, *supra*).[10] The firm admittedly did not relish the prospect of having to deal with its employees through a collective bargaining agent and, on the same day that Foreman Gilly fired Frederick, another employee, Leeper, was discharged by Partner Nemec because he acted as spokesman for the welders on the

[10] *N.L.R.B.* v. *Weyerhaeuser Timber Co.*, 132 F. 2d 234, 236 (C.A. 9); and see *Angwell Curtain Co. Inc.* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7).

night shift in their concerted attempt to obtain concessions from respondent relating to their wages and working conditions (pp. 4-5, *supra* and pp. 17-21, *infra*). At the time of Frederick's discharge, nothing was said about the alleged negligence or inefficiency on which respondent later relied to explain its action (*supra,* pp. 5-7). These circumstances, we submit, justify the Board's inference that Frederick's union activity was the operative cause of his abrupt discharge.[11] He was not a model workman (cf. R. 21), but "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc.* v. *N.L.R.B.,* 162 F. 2d 457, 460 (C.A. 9).

In this case, the inference that union activity was "the moving cause" is strengthened by the fact that respondent's attempted explanation of Frederick's discharge does not "stand up under scrutiny." *N.L.R.B.* v. *Abbott Worsted Mills,* 127 F. 2d 438, 440 (C.A. 1), quoted with approval in *N.L.R.B.* v. *J. G. Boswell Co.,* 136 F. 2d 585, 595 (C.A. 9); see also *N.L.R.B.* v. *Weyerhaeuser Timber Co.,* 132 F. 2d 234, 236 (C.A. 9); *N.L.R.B.* v. *Bird Machine Co.,* 161 F. 2d 589, 592 (C.A. 1). The explanation given Frederick by Foreman Gilly in the final interview was obviously not true; contrary to what Gilly implied, Partner Nemec had not been consulted about the discharge (*supra,* p. 5) and if Frederick's alleged laxity about cleaning his machines—the only specific fault Gilly mentioned at that time[12]—had

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[11] See *N.L.R.B.* v. *Dinion Coil Co.,* 201 F. 2d 484, 487 (C.A. 2); *N.L.R.B.* v. *Smith Victory Corp.,* 190 F. 2d 56, 57-58 (C.A. 2); *Peoples Motor Express Co.* v. *N.L.R.B.,* 165 F. 2d 903, 904 (C.A. 4); *Magnolia Petroleum Co.* v. *N.L.R.B.,* 200 F. 2d 148, 149-150 (C.A. 5); and cases cited *infra,* p. 15.

[12] As noted above (p. 4, note 4, *supra*), the Trial Examiner did not credit Gilly's testimony that he mentioned other, and more recent

been a matter of particular concern to respondent since 1948, no one had told Frederick about it (p. 5, *supra*). Compare *N.L.R.B.* v. *State Center Warehouse, etc.*, 193 F. 2d 156, 158 (C.A. 9).

In the proceedings before the Board a year later,[13] Foreman Gilly cited several other grounds of complaint against Frederick, all arising during the last month of the employee's tenure (*supra*, pp. 5-7). But the foreman was not a reliable witness, in the Trial Examiner's judgment, and even if his story of Frederick's allegedly objectionable behavior is believed, it still does not account for respondent's contemporaneous treatment of the employee. If Gilly, as he professed, was exasperated to the breaking point by the toolholder incident (*supra*, p. 7), it becomes inexplicable that when he paid Frederick off he did not mention that alleged offense, which occurred only a few hours before the discharge. Instead he resuscitated the stale complaint that Frederick had failed to clean his machines properly. "Such action on the part of an employer is not natural." *E. Anthony & Sons* v. *N.L.R.B.*, 163 F. 2d 22, 26 (C.A.D.C.), certiorari denied, 332 U.S. 773. Similarly, Gilly's own account of the sledgehammer episode (*supra*, p. 6) strongly suggests that, in retrospect, he imagined or exaggerated the element of insubordination which was supposedly involved. At the time of that incident, which occurred a week before the discharge, he did not scold Frederick and his fellow-

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misdemeanors. "For obvious reasons, questions of credibility were for the examiner." *N.L.R.B.* v. *State Center Warehouse, etc.*, 193 F. 2d 156, 157 (C.A. 9).

[13] In weighing the evidence as to the motivation for a discharge, the Board may properly discount "palpable afterthought[s]." *N.L.R.B.* v. *Wells, Inc.*, 162 F. 2d 457, 459 (C.A. 9); and see *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347.

worker for their alleged disobedience of his order to stop using the sledgehammer. He only told them to modify their procedure if they chose to continue using the hammer; and this, too, was something he failed to mention when he discharged Frederick.

Finally, as the Board observed, respondent's claim that Frederick had been tentatively slated for discharge since early December is not believable (*supra,* pp. 5-6), cf. R. 21). It was then, according to Martin and Gilly, that they became annoyed with the employee for allegedly threatening to quit unless he were relieved of the carbon-boring job, and at the same time concluded that he was both disinterested in his job and unqualified for work other than carbon boring. Yet, these officials did not take advantage of the opportunity, which Frederick himself had allegedly created for them, to get rid of a man who was said to be disgruntled, and incompetent as well. Instead, they kept him on and gave him other work to do. Their testimony that Frederick, from that time on, was only on trial until "after the first of the year" (*supra,* p. 6) hardly squares with their failure to warn him that he must mend his ways, or with their sudden decision to discharge him a few days *before* New Year's.

All these things considered, it is patent that respondent had some compelling reason for the summary discharge which its officials did not see fit to disclose to Frederick at the time. And, we submit, the Board's finding that the hidden cause was, in fact, the employee's union activity constitutes a reasonable "choice between two * * * conflicting views." *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 488; *N.L.R.B.* v. *Howell Chevrolet Company,* F. 2d (C.A. 9), 31 LRRM 2462 (decided Feb. 26, 1953) and cases there

cited. It goes without saying that a discharge so motivated violates Section 8 (a) (3) and (1) of the Act.

B. *Respondent excluded Clarence Leeper from his job because he engaged in concerted activity protected by Section 7 of the Act*

The only disputed question of fact in Clarence Leeper's case is whether he was discharged, as the Board found, or quit his job, as respondent contends. Either way, respondent seems to concede, Leeper's separation from the payroll on December 28 resulted directly from the welding shop incident which took place the night before, in which the employee acted as spokesman for his fellow workers in presenting a common grievance to management (*supra,* pp. 8-10). And this incident, as respondent also appears to concede, was undoubtedly an episode of "concerted activit[y] for the purpose of * * * mutual aid or protection" (Section 7) for which the participants could not lawfully be discharged. *N.L.R.B.* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 750 (C.A. 9) and cases there cited; *N.L.R.B.* v. *Tovrea Packing Co.,* 111 F. 2d 626, 629 (C.A. 9) certiorari denied 311 U.S. 668; *N.L.R.B.* v. *J. I. Case Co.,* 198 F. 2d 919, 922 (C.A. 8), certiorari denied, 345 U.S. 917.[14]

The Board's finding that Leeper did not quit, but was

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[14] The fact, emphasized by respondent in its exceptions before the Board (R. 32), that Leeper was not a Union man and did not act for the Union in instigating the collective activity in the welding shop may be relevant to the question whether respondent violated Section 8(a) (3) of the Act, as well as 8(a) (1), in discharging him—as to which, see discussion at pp. 20-21 *infra*, and note 18. But under Section 7 and 8(a) (1) of the Act, the employees were clearly protected in staging a brief work stoppage to reinforce their demand for higher pay, notwithstanding that they acted spontaneously and without the backing of the Union. *Globe Wireless* and other cases cited *supra.*

discharged because he created an "uproar" by instigating the welders' work stoppage is fully supported by the evidence. Co-partner Nemec's own account of the colloquy in the welding shop on the evening of December 27 (*supra*, p. 9) shows that Leeper certainly did not resign then and there; he only threatened to "quit" —and in the context, obviously meant "strike"—unless respondent agreed to redress the welders' grievances within 24 hours. When Leeper left the plant the next morning, after working out the shift, he did not take his tools, as an employee who had quit would normally have done (*supra*, pp. 9-10). And on the afternoon of the 28th he returned to the plant at the usual time (*supra*, p. 10). Since he died before the hearing, there is no competent direct evidence as to whether he then had anything in mind except to go to work as usual. But the absence of such evidence is unimportant, for respondent did not wait to see whether Leeper would quit, or make good his threat to lead the welders out on strike, or reconsider his 24-hour "ultimatum".

Assuming the initiative at that point, Nemec went to Leeper's house about an hour before shift time, taking the employee's paycheck with him. In his conversation with Mrs. Leeper, although claiming that the husband had "quit," Nemec made it clear that Leeper was now *persona non grata* at the plant, "due to the trouble he had stirred up in the welding shop." Accordingly, he added, the employee "couldn't [be] put back" to work (p. 10, *supra*). A day or two later, Nemec admittedly said the same thing to Leeper himself when the employee applied to him for reinstatement (p. 11, *supra*). At the same time, he awarded Leeper the "call-in" pay

he demanded for the afternoon of the 28th,[15] an action which does not square with his asserted belief that Leeper had voluntarily abandoned his job 12 hours before going to the plant that afternoon.[16]

In sum, Nemec's own contemporaneous actions and statements, far from bearing out the contention that Leeper quit his job, provide cogent support for the Board's finding that the employee was, in fact, discharged. A case in point here is *N.L.R.B.* v. *Stowe Spinning Co.*, 165 F. 2d 609, 615 (C.A. 4), certiorari denied 344 U.S. 831 where the court, commenting upon a factual situation which strongly resembles Leeper's case, said

> The question [is] whether Hall was discharged for union activities, as the Board found, or resigned rather than do the work required of him * * * He was an active union organizer, and there is some evidence that his conduct in this respect was known to his employer. He was an unusually good worker and the alacrity with which the overseer seized upon his statement that he was quitting, and the subsequent refusal of the superintendent to grant his request for reinstatement, tend to show that the company's position was actuated by something other than his conduct on his last day at the plant [i.e., declaring, in a moment of anger, that he would quit rather than do the work the overseer required].

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[15] "Call-in" or "reporting" pay is "the amount of pay guaranteed to a worker who reports for work at the usual hour, without notification to the contrary, and finds no work available * * *". U.S. Department of Labor: *Glossary of Currently-Used Wage Terms*, 1949, p. 21.

[16] Nemec's implausible explanation that Leeper was given the 4 hours call-in pay because he complained of respondent's failure to have his final check ready for him at 4:00 a.m. that morning was specifically discredited by the Trial Examiner (R. 20).

So here, even if respondent placed a literal interpretation upon Leeper's statement that he would quit unless something was done about the welders' pay, Partner Nemec "seized upon" that statement with "alacrity" and used it as the pretext for his subsequent refusal to let the employee go back to his job. And here, even more plainly than in the *Stowe* case, it is evident—indeed, admitted—that respondent's decision to exclude the employee from his position was "actuated" by its resentment of the leading role he had played in the welders' concerted demand for an increase in pay. By denying Leeper employment for this reason,[17] respondent manifestly infringed its employees' statutory right to act together for "mutual aid and protection" (Sec. 7), and violated Section 8(a)(1) of the Act. See *N.L.R.B.* v. *John H. Barr Marketing,* No. 13465, this term, per curiam opinion, June 2, 1953, enforcing 96 NLRB 875; and cases cited at p. 17, *supra.* Moreover, since the employees at the plant were then in the midst of a Union organizational campaign which was bound to be affected by any manifestation of respondent's hostility to concerted activity protected by the Act, and since the welders who acted under Leeper's leadership constituted an *ad hoc* "labor organization" (Act, Sec. 2(5)), the Board's determination that respondent's treatment of Leeper likewise discouraged membership in a labor

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[17] As we have shown, the record fairly establishes that Leeper's loss of employment was actually the result of a discharge, not a resignation. But even if he did quit his job an the night of the 27th or the morning of the 28th, respondent anticipated his immediate application for reemployment and refused to take him back for the stated reason that he had "stirred up trouble" in the welding shop (pp. 10-11 *supra*). Under the rule of *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, this was an unfair labor practice, regardless whether it be deemed a discharge or a refusal to hire an applicant for employment. See also *N.L.R.B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 593, note 6 (C.A. 9).

organization, in violation of Section 8(a)(3) of the Act, is also entitled to stand.[18]

II. The Board Properly Overruled Respondent's Objections to the Complaint, Based on the Six-month Limitation Proviso in Section 10 (b) of the Act

Section 10 (b) of the Act (*infra,* p. 31) authorizes the Board to issue a complaint "whenever it is charged" that any person has committed an unfair labor practice. A proviso to this Section, added by the Taft-Hartley Act, states that

> no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *.

The Union's charge in the present case was filed on February 1, 1951. This was within the six-month limitation period, since the unfair labor practices which gave rise to the proceeding occurred on December 28, 1950. Respondent contends, however, that the complaint, which was issued on November 14, 1951,[19] was barred by the proviso insofar as its allegations respecting the Frederick-Leeper discharges are concerned. This contention refers to certain differences between

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[18] *Tovrea Packing Co.*, 12 NLRB 1063, 1070, enf'd 111 F. 2d 626, 629 (C.A. 9), certiorari denied 311 U.S. 668; *N.L.R.B.* v. *Kennametal, Inc.*, 182 F. 2d 817, 818 (C.A. 3); and see *N.L.R.B.* v. *J. G. Boswell Co., supra,* 136 F. 2d at 595-596; but cf. *Gullett Gin Co.* v. *N.L.R.B.*, 179 F. 2d 499, 502 (C.A. 5); *Modern Motors, Inc.* v. *N.L.R.B.*, 198 F. 2d 925, 926 (C.A. 8)

Even if Leeper's discharge be regarded as a violation of Section 8(a)(1) alone, and not Section 8(a)(3) as well, the remedy is the same. See *N.L.R.B.* v. *J. I. Case, supra,* 198 F. 2d at 922-923, 924; *N.L.R.B.* v. *Nu-Car Carriers,* 189 F. 2d 756, 760 (C.A. 3), certiorari denied 342 U.S. 919; *Gullett Gin* case, *supra, loc. cit.*

[19] The Act contains no limitation as to the time when a complaint may be issued. Cf. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53.

the descriptive language of the complaint and the corresponding averments of the underlying charge. The complaint stated that the two employees were discharged

> for the reason that they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection (R. 5-6);

whereas the charge recited that Frederick and Leeper were discharged

> upon the grounds that these employes were engaging in union organizational activities * * * (R. 2).

Both charge and complaint alleged that respondent violated Section 8 (a) (1) of the Act as well as Section 8 (a) (3) by discharging the two employees;[20] and both identified the transactions complained of by giving the names of the individuals and the date of their dismissals. The only difference is that the detailed averment in the complaint is broad enough to describe, not only a discharge for "union" activity (which fits Frederick's case exactly),[21] but also a discharge for "concerted"

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[20] An additional allegation in both charge and complaint (R. 2, 6), to the effect that respondent also violated Section 8 (a) (1) by attempting to influence employees to reject the Union at or about the time of the Board election in January 1951 (misstated 1950 in the charge and complaint) was dismissed by the Trial Examiner at the hearing (R. 137-138, 140). Since the Examiner ruled that he would not dismiss the Section 8 (a) (1) allegations of the complaint as to the discharges of Frederick and Leeper (R. 140, cf. R. 12), there is no basis for respondent's contention (Exceptions 1 and 6, R. 31-32, 33) that the Board's discrimination findings are founded on allegations which were dismissed.

[21] "Union" activity, of course, is a form of "concerted activities * * * for the purpose of collective bargaining and other mutual aid and protection." Accordingly, respondent's contention that the language of the complaint does not support the Board's finding that

activity *not* undertaken in behalf of a union (which fits Leeper's case exactly), whereas the charge refers specifically to "union" activity alone. Despite this variance the charge manifestly served, as well as the complaint, to put respondent "on notice that the [two named] employee[s] challenge[d] its basis for dismissing [them]" (*N.L.R.B.* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C.A. 3)). Yet respondent argues that the Board was "without jurisdiction" (R. 32, 33) to proceed in this case because the complaint departed from the charge so radically as to state "new and additional" (R. 32) or "new and different" (R. 33) unfair labor practices, not included in any timely charge. This position, we maintain, is completely untenable.

Except for insertion of the proviso on which respondent relies, the provisions of Section 10 (b) relating to charges and complaints were reenacted without change in 1947. And under the Wagner Act it was generally recognized that the permissible scope of a Board complaint was not limited by the averments of the underlying charge. See *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 225; *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 367-369; *Consumers Power Co.* v. *N.L.R.B.*, 113 F. 2d 38, 42-43 (C.A. 6); *N.L.R.B.* v. *American Creosoting Co.*, 139 F. 2d 193, 195 (C.A. 6), certiorari denied 321 U.S. 797; *Fort Wayne Corrugated Paper Co.* v. *N.L.R.B.*, 111 F. 2d 869, 873 (C.A. 7); *Killefer Mfg. Corp.*, 22 NLRB 484, 488. The basic reason for this rule was indicated by the Supreme Court's comment in *N.L.R.B.* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18: "The charge * * * merely sets in

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Frederick was discharged for "union" activity (Excep. 5, R. 33) appears to be frivolous.

motion the machinery of an inquiry. * * * [It] does not even serve the purpose of a pleading."

The proviso which was added to Section 10 (b) in 1947 does not convert the charge into a pleading. This amendment, as the Board explained in *Cathey Lumber Company,* 86 NLRB 157, 158-163 (1949), affirmed 185 F. 2d 1021 (C.A. 5)[22] only serves the purpose of a statute of limitations which extinguishes liability for "any" unfair labor practices committed by the party respondent more than 6 months before the filing and service of "the" charge initiating the case.[23] But it is still true since the enactment of the Taft -Hartley Act, as before, that "The Act contains no specification of what constitutes a proper charge, save that it shall state that the respondent has engaged, or is engaging in any unfair labor practices affecting commerce. * * * We must keep in mind that the statutory powers of the Board include not only the conduct of hearings and the entry of cease and desist orders, but [also] preliminary investigatory authority necessary to * * * the formulation and issue of a complaint," *Consumers Power Co.* v. *N.L.R.B.*, 113 F. 2d 38, 42 (C.A. 6). Nothing in the language or legislative history of the Section 10(b) proviso suggests that its purpose is to curtail this "investigatory authority," now vested in the General Counsel. Yet the scope of the preliminary investigation, and even the General Counsel's choice of legal issues to be framed

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[22] Vacated on other grounds, 189 F. 2d 428, but reaffirmed on this point in *Stokely Foods, Inc.* v. *N.L.R.B.,* 193 F. 2d 736, 737-738 (C.A. 5).

[23] See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53; S. Rep. No. 105, 80th Cong., 1st Sess., p. 26; H. Rep. No. 245, 80th Cong., 1st Sess., p. 40; also *N.L.R.B.* v. *Itasca Cotton Mfg. Co.,* 179 F. 2d 504, 506 (C.A. 5), where the court said, "We agree * * * that the statute is a statute of limitations, and not one of jurisdiction * * *."

and tried in a given case is necessarily restricted if the charge fixes the permissible limits of the complaint, as respondent in the present case assumes it must do.[24] Indeed, a Board proceeding under Section 10 of the Act would be converted into a species of private lawsuit, under the construction of the proviso which respondent advocates, for the initial responsibility of framing the legal issues in the case, as well as the burden of discovering all the essential facts, would be shifted from the General Counsel to the private party who happens to file the charge.[25] This would be a drastic departure from the fundamental statutory concept that the Board, once its jurisdiction is invoked, proceeds, not in vindication of private rights, but as an administrative agency charged by Congress with the function of bringing about compliance with the Act's provisions. See *National Licorice Co.* v. *N. L. R. B.*, 309 U.S. 350, 362 and authorities there cited; also *Medo Photo Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687.

The foregoing considerations have prompted a majority of the Circuit Courts to hold, in agreement with the Board, that a complaint under the amended Act may properly deviate from the charge, provided only that the violations included in the complaint did not occur prior to the 6-months' period of limitation fixed by the filing and service of the charge. As held by the Third

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[24] The Board's power to amend the complaint "in its discretion at any time prior to the issuance of an order based thereon * * *" (Section 10(b)) would also appear to be aborted under this view. Cf. *N.L.R.B.* v. *Kanmak Mills, Inc.*, 200 F. 2d 542, 544-545 (C.A. 3).

[25] As the Court of Appeals for the 10th Circuit observed in *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415, "Anyone can file a charge. Many are filed by private citizens unskilled in the law or art of pleading."

Circuit in *N.L.R.B.* v. *Kingston Cake Company, Inc.*, 191 F. 2d 563, 567

> The purpose of the charge is not to define the issues to be tried with the precision that is sought normally in pleadings in law suits. * * * it would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegation.

See also *Cusano* v. *N.L.R.B.*, 190 F. 2d 898, 903-904 (C.A. 3). And the Second Circuit, justifying the same result in terms of a liberal "relation back" doctrine, stated in *N.L.R.B.* v. *Gaynor News Company, Inc.*, 197 F. 2d 719, 721, certiorari granted, 345 U.S. 902

> This Section [10 (b), as amended] has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which "relate back" or "define more precisely" the charges enumerated within the original and timely charge. The "relating back" doctrine for this purpose has been liberally construed to give the Board *wide leeway for prosecuting offenses unearthed by its investigatory machinery,* set in motion by the original charge (italics added.)

See also *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2). Similar views have been expressed by the First, Fifth, Seventh, and Tenth Circuits: *N.L.R.B.* v. *Kobritz*, 193 F. 2d 8, 14-16 (C.A. 1); *N.L.R.B.* v. *Cathey Lumber Co.*, 185 F. 2d 1021 (C.A. 5) (see footnote 22, p. 23, *supra*); *Stokely Foods, Inc.* v. *N.L.R.B.*, 193 F. 2d 736, 737-738 (C.A. 5); *N.L.R.B.* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13 (C.A. 5); *N.L.R.B.* v.

Bradley Washfountain Co., 192 F. 2d 144, 149 (C.A. 7); *Kansas Milling Co.* v. *N.L.R.B.,* 185 F. 2d 413, 415 (C.A. 10). This Court, too, although it has yet to decide a case in which the complaint or an amended charge filed after the 6-months' limitation period embraced a violation omitted from the timely charge,[26] has held that there is no objection to a complaint which describes with particularity violations which were stated "in only the most general terms" in the charge. *Katz et al.* v. *N.L.R.B.,* 196 F. 2d 411, 415 (C.A. 9), citing with approval the *Cusano, Westex,* and *Kansas Milling* cases, *supra.*

The foregoing decisions support the result reached by the Board in the present case. Insofar as the complaint herein can be said to depart from the charge, it only indicates a slightly changed *reason* for the claim—advanced in the timely charge as well as the complaint itself—that the discharges of both Frederick and Leeper violated both Section 8 (a) (1) and (3) of the Act. A similar variance in the description of "the identical fact situation—the discharge of [the same employee]," was termed "at most, a slight change in legal theory" and held to be inconsequential in the *Cusano* case, *supra* (190 F. 2d at 903 (C.A. 3)). And in the *Westex* case, *supra,* the Fifth Circuit upheld a complaint which departed from the underlying charge, exactly like the complaint in this case, by stating that certain employes were discharged for "concerted" activity rather than "union" activity (190 F. 2d at 13). The contrary opinion of the Fourth Circuit in an earlier case, *Joanna Cotton Mills* v. *N.L.R.B.,* 176 F. 2d

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[26] Cf. *N.L.R.B.* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 752 (C.A. 9).

749, 754, was rejected *sub silentio* by the Third and Fifth Circuits in *Cusano* and *Westex;* it adopts a hypertechnical approach to the charge which conflicts with the cases cited *supra,* pp. 23-25; and it has not been followed by other Circuits in any of the comparable cases arising under the amended Act (*supra,* pp. 26-27).[27] For these reasons, the Board respectfully submits that the *Joanna* opinion misconstrues the requirements of Section 10 (b), and that it should not be followed by this Court.

To recapitulate, we contend that the Board properly held that the charge provides an adequate foundation for the complaint in the case at bar since the charge was seasonably filed and served, and it describes in both general and specific terms unfair labor practices which are, to say the very least, closely related to the violations alleged in the complaint and proved by the evidence.

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[27] In *Joanna,* as here, the timely charge stated that an employee had been discharged for "union" activity, whereas the complaint alleged, and the Board found, that the reason for the discharge was the employee's participation in "concerted" activity. The court expressed the opinion that this was a fatal variance because the complaint introduced "a new and entirely different charge of unfair labor practice from that contained in the original charge." This ruling, however, was not essential to the court's decision, for it first considered the merits of the case and held, reversing the Board, that the "concerted" activity for which the employee was discharged was not protected by the Act, hence the discharge was not an unfair labor practice in any event.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

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JUNE, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 151, *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

(c) * * * If upon the preponderance of the

testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in

whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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